

Koval v St Nicholas 175 Assoc LLC
2017 NY Slip Op 31156(U)
May 31, 2017
Supreme Court, New York County
Docket Number: 157027/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

ZACHARY KOVAL, Plaintiff, -against-

INDEX NO. 157027/2016 MOTION DATE 04-19-2017 MOTION SEQ. NO. 001 MOTION CAL. NO.

ST NICHOLAS 175 ASSOC LLC, a/k/a ST. NICHOLAS ONE SEVEN FIVE ASSOCIATES, L.L.C., LAURENCE GLUCK, SMAJLJE SRDANOVIC, STELLAR MANAGEMENT CO., and RAMSES CAPELLAN, Defendants.

The following papers, numbered 1 to 8 were read on this motion and cross-motion for Summary Judgment.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes [] No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Laurence Gluck (herein "Gluck"), Smajlje Srdanovic (herein "Srdanovic"), and Ramses Capellan's (herein "Capellan", together "Moving Defendants") motion for summary judgment to dismiss the Complaint against them pursuant to CPLR §3212 is granted.

Plaintiff commenced this action on August 19, 2016 against Defendants to recover for: (i) rent overcharge, (ii) breaches of the warranty of habitability, and (iii) legal fees. Plaintiff was a tenant in an Apartment owned by Defendant St. Nicholas One Seven Five Associates, LLC (herein "St. Nicholas LLC") located at 1306 St. Nicholas Avenue, New York, New York from October 2014 through September 2016.

The Moving Defendants move for summary judgment contending that as members or employees of Defendant St. Nicholas LLC, they cannot be held personally liable for any alleged damages and therefore the Complaint should be dismissed against them. Plaintiff opposes the motion and cross-moves for summary judgment against all the Defendants. Plaintiff also moves to dismiss all the Defendants' Affirmative Defenses in their Answer.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light

most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

"A member of a limited liability company cannot be held liable for the company's obligations by virtue of his or her status as a member thereof" (Bd. of Mgrs. of 325 Fifth Ave. Condo. v Cont'l Residential Holdings LLC, 2017 NY Slip Op 02758, ¶¶ 2-3 [App. Div.] *quoting* Matias v Mondo Props., LLC, 43 AD3d 367, 841 NYS2d 279 [1st Dept 2007]). "The law permits the incorporation of a business for the very purpose of escaping personal liability" (Bd. of Mgrs. of 325 Fifth Ave. Condo., supra *quoting* Bartle v Home Owners Coop., 309 NY 103, 127 NE2d 832 [1955]; see also East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 884 NYS2d 94 [2nd Dept 2009], affd 16 NY3d 775, 944 NE2d 1135, 919 NYS2d 496 [2011]).

Pursuant to the annexed Stipulation, Plaintiff agreed to discontinue any and all causes of action against Defendant Gluck (Reply Papers Ex. A). Plaintiff rented the Apartment by signing a lease and renewal lease with Defendant St. Nicholas LLC. Defendants Srdanovic and Capellan cannot be held liable as members or employees and agents for St. Nicholas LLC's alleged violations. The Moving Defendants motion for summary judgment is granted as they have made a prima facie showing of entitlement to judgment as a matter of law that Plaintiff fails to rebut.

The court finds Defendants contention that Plaintiff's cross-motion should be denied as defective unavailing. The court "may permit a mistake, omission, defect or irregularity...to be corrected...if a substantial right of a party is not prejudiced, the mistake, omission defect or irregularity shall be disregarded" (CPLR §2001). Plaintiff failed to originally file the notice of cross-motion, a violation of CPLR §2215. However, his affirmation expressly stated "I am making this affirmation in opposition to the Defendants' motion and in support of the instant cross motion" (Opposition Papers' Affirmation Pg. 1 ¶ 2). Plaintiff submitted this cross-motion on January 26, 2017, well before the return date of February 3, 2017. He filed the notice for cross-motion prior to the date of oral argument on February 27, 2017 (Opposition Papers' Supplemental Affirmation). The court will entertain the cross-motion.

A rent-stabilized apartment's rent is frozen at the last registered rent price when a landlord fails to register the rent (RSL 26-517[3]). A vacant apartment is not decontrolled unless the rent of the outgoing tenant prior to the vacancy exceeds the decontrol threshold (Altman v 285 W. Fourth LLC, 127 AD3d 654, 8 NYS3d 295 [1st Dept. 2015]). The deregulation threshold at the relevant time was \$2,500.00 (RSL Section 26-504.2, Emergency Tenant Protection Act Section 5[a][13]). It is necessary that the tenant receive a rent stabilization rider for an owner to increase the rent amount (RSC 2522.5[c][3]).

Plaintiff makes a prima face showing of entitlement to judgment as a matter of law for being overcharged as a tenant at the Apartment against Defendant St. Nicholas LLC. The Apartment is subject to Rent Stabilization Law (Opposition Papers Ex. D). Plaintiff was given an annual registration form showing the Apartment became permanently exempt because of a high rent vacancy (Opposition Papers Ex. E). This form stated the last legal regulated rent was \$983.95 in 2014 (id). However,

this apparent last legal regulated rent was not registered with the Division of Housing and Community Renewal (herein "DHCR") by Defendant St. Nicholas LLC. The DHCR's record contradicts Defendant St. Nicholas LLC's registration form as the last documented regulated rent was in 1998 for \$612.74 (Opposition Papers Ex. D). Defendant St. Nicholas LLC failed to correctly register the apparent \$983.95 rent amount in 2014 and thus, the \$612.74 rent controls.

Furthermore, the Defendants concede that Plaintiff was never given a rent stabilization rider. As a result, he was overcharged as a tenant from October 2014 through September 2016. There remains an issue of fact as to the amount of damages. Plaintiff states the amounts sought (\$141,061.45) is correct and authorized pursuant to a 9% per annum interest rate without providing evidence that a 9% rate should apply. This warrants an inquest on damages prior to entry of judgment.

Plaintiff fails to makes a prima facie showing of entitlement to judgment as a matter of law for his Second Cause of Action of an alleged breach of habitability by Defendants. Self serving affidavits without accompanying evidence offers zero probative value. The court finds Plaintiff's annexed exhibit memorializing all violations of the apartment building unavailing as none of the violations listed refer to his specific Apartment (Opposition Papers Ex. F).

When moving to dismiss an affirmative defense pursuant to CPLR §3211[b], "the plaintiff bears a heavy burden of showing that the defense is without merit as a matter of law" (Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 19 NYS3d 13 [1st Dept. 2015] quoting 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541, 935 NYS2d 23 [1st Dept 2011]). "The allegations set forth in the answer must be viewed in the light most favorable to the defendant" (182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198, 751 NYS2d 739 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (534 E. 11th St., *supra*). The court should not dismiss a defense when questions of fact remain (id).

Plaintiff has demonstrated that the Defendants' First, Third and Fourth Affirmative Defenses are without merit as a matter of law and are hereby dismissed. Defendants' First Affirmative Defense is that the Complaint fails to state a cause of action. Defendants' Third Affirmative Defense is that the Apartment is exempt from rent regulation. The Defendants' Fourth Affirmative Defense is based upon the statute of limitations. Plaintiff has demonstrated a valid cause of action and that the Apartment was not exempt from rent regulation. The statute of limitations for rent overcharges is four (4) years, with a two (2) year statue of limitations for treble damages and the warrant of habitability has a six (6) year statute of limitations. This action was brought less than (2) years after Plaintiff's lease (CPLR §213[a], RSL 26-516a[2][l]).

Accordingly, it is ORDERED, that Defendants Laurence Gluck, Smajlje Srdanovic, and Ramses Capellan's motion to dismiss the Complaint against them pursuant to CPLR §3212 is granted, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Defendants Laurence Gluck, Smajlje Srdanovic, and Ramses Capellan, are hereby severed and dismissed, and it is further,

ORDERED, that the causes of action in the Complaint asserted against **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.**, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

ZACHARY KOVAL,
Plaintiff,

-against-

ST NICHOLAS 175 ASSOC LLC, a/k/a ST. NICHOLAS ONE SEVEN FIVE ASSOCIATES, L.L.C. and STELLAR MANAGEMENT CO.,
Defendants.

and it is further,

ORDERED, that Plaintiff's cross-motion pursuant to CPLR §3212 against Defendant **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C.** for summary judgment dismissing the First Cause of Action is granted on liability, and it is further,

ORDERED, that Plaintiff is granted Judgment on Liability on the First Cause of Action of Rent Overcharge against Defendant **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C.**, and it is further,

ORDERED, that the remainder of Plaintiff's cross-motion pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that Plaintiff's cross-motion pursuant to CPLR §3211[b] to dismiss the First, Third and Fourth Affirmative Defenses of the Defendants **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.**'s Answer is granted, and it is further,

ORDERED, that the First, Third and Fourth Affirmative Defenses of Defendants **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.**'s Answer are hereby severed and dismissed, and it is further,

ORDERED, that the remaining Affirmative Defenses in the Defendants **St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.**'s Answer remain in effect, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Plaintiff shall serve a copy of this Order with Notice of Entry on all parties appearing, upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B) who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the parties appear for a Compliance Conference on September 20, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

Enter:

Dated: May 31, 2017


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE